

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
 WASHINGTON, DC 20554

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 FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j) of the
 Communications Act – Competitive Bidding
 for Commercial Broadcast and Instructional
 Television Fixed Service Licensees

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MM Docket No. 97-234

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Reexamination of the Policy Statement
 on Comparative Broadcast Hearings

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GC Docket No. 95-52 92-521

Proposals to Reform the Commission's
 Comparative Hearing Process to Expedite
 the Resolution of Cases

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GEN Docket No. 90-264

To: The Commission
Reference No. 1800B3-TSN

PETITION FOR REVIEW

Pursuant to Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115,¹ Anchor Broadcasting Limited Partnership ("Anchor") requests that the Commission reverse the decision of the Chief of the Audio Services Division, Mass Media Bureau (the "Bureau"), denying Anchor's petition (the "Petition") for a temporary exemption, either by declaratory ruling or waiver, from the requirement that Anchor pay the balance due on the winning bid it submitted in Auction #25, the Closed Broadcast Auction (the "Auction"). The construction permit on which Anchor placed the high bid is the subject of ongoing litigation, to which the FCC is a party.² This litigation could result

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1. The relief Anchor requests herein involves a question of law or policy that has not previously been resolved by the Commission, and involves application of a precedent that should be overturned or revised. *See* 47 C.F.R. § 1.115(b)(2)(ii)-(iii).
 2. *Orion Communications, Ltd. v. FCC*, Nos. 98-1424 and consolidated cases, slip op. (D.C. Cir. June 13, 2000) (per curiam) ("*Orion Communications*"). Anchor is unaware that any
 (continued...)

in revocation of the proposed grant of the permit to Anchor, thus creating substantial uncertainty over the security of Anchor's interest in the permit. Anchor's interest in the permit will not sufficiently vest until Anchor holds the permit free of unusual and extraordinary encumbrances, which will only occur if and when the pending litigation concludes in Anchor's favor.

Anchor contends that the uncertainty caused by the pending litigation makes its position legally indistinguishable from that of a winning bidder whose long-form application has been challenged by a petition to deny. Such applicants face similar uncertainty about their ultimate right to hold the permit for which they placed the high bid. These applicants need not pay the balance due on their winning bids until the Commission rules on the petition to deny. Anchor believes that because it is similarly situated, it should receive similar treatment. The Bureau, in response to both Anchor's original Petition and to a subsequent Petition for Reconsideration,³ has rejected Anchor's argument based on faulty logic and misunderstood facts. Thus, Anchor requests that the Commission reverse the Bureau's decision, and not require Anchor to pay the balance on its winning bid until all challenges to Anchor's interest in the permit have terminated.

In support thereof, Anchor incorporates by reference the arguments presented in the Petition and Petition for Reconsideration, and further states the following:

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2. (...continued)
party filed a petition *en banc* rehearing of the Court's decision as of the June 20, 2000 deadline. Petitions for Supreme Court review, if filed, are due on July 13, 2000.
 3. See Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau to Anchor Broadcasting Limited Partnership (March 9, 2000) (responding to Petition for Declaratory Ruling) ("First Letter Ruling"); Letter from Linda Blair, Chief, Audio Services Division, Mass Media Bureau to Anchor Broadcasting Limited Partnership (May 23, 2000) (responding to Petition for Reconsideration) ("Second Letter Ruling")

Background

Fifteen years ago, Anchor was one of several parties that filed mutually exclusive applications for a permit to build an FM radio station on Channel 250A at Selbyville, Delaware (the “Selbyville Permit”). Only two of these original parties (other than Anchor) remain involved in this proceeding today: Susan M. Bechtel (“Bechtel”) and Galaxy Communications, Inc. (“Galaxy”).⁴

Anchor first won the Selbyville Permit in a 1991 hearing, on the basis of the Commission’s comparative criteria.⁵ Bechtel appealed this decision to the D.C. Circuit, challenging the Commission’s use of “integration of ownership and management” as one of the primary criteria for deciding comparative hearing cases. The Court found that the Commission had not sufficiently explained the rationale for using this criterion to choose among competing applicants, and thus remanded the case with orders that the Commission reconsider its comparative criteria and evaluate the candidates for the Selbyville permit using these new standards.⁶

On remand, the Commission revised its comparative criteria and reevaluated Anchor’s case. Following these new criteria, the Commission again chose to award the permit to Anchor.⁷ Bechtel once again appealed the Commission’s decision to the D.C. Circuit. This time,

4. The Commission and Galaxy incorrectly contend that because Galaxy placed bids on the Selbyville Permit during the Auction, it is appropriate to consider Galaxy’s opposition to Anchor’s request for a temporary delay of its payment obligation. Galaxy has no discernable right or interest involved in the issue of *when Anchor should submit payment of its winning bid* to the Commission. Accordingly, Galaxy has no standing to comment on Anchor’s Petition, or subsequent Petition for Reconsideration.

5. *See Anchor Broadcasting Limited Partnership*, 6 FCC Rcd 721 (1991).

6. *See Bechtel v. F.C.C.*, 957 F.2d 873 (D.C. Cir. 1992) (*Bechtel I*).

7. *See Anchor Broadcasting Limited Partnership*, 7 FCC Rcd 4566 (1992), *modified on other grounds* 8 FCC Rcd 1674 (1993).

the Court found the Commission's continued use of the integration preference arbitrary and capricious, and thus unlawful. The court remanded the case to the Commission for reconsideration without use of the integration criterion.⁸ In light of the D.C. Circuit's decision, the Commission discontinued using comparative hearings to allocate broadcast construction permits, and froze any proceedings then underway.⁹ The Commission also initiated a proceeding to devise alternative comparative criteria that would meet with the court's approval.¹⁰

While this proceeding was pending at the Commission, Congress passed the Balanced Budget Act of 1997.¹¹ The Commission interpreted the Act to permit the use of competitive bidding when selecting among mutually exclusive applications filed before July 1, 1997.¹² Bechtel objected to this decision, as well as the Commission's decision to terminate the Selbyville Permit comparative proceeding,¹³ and thus filed two additional appeals to the D.C. Circuit.¹⁴ After consolidating these appeals with several other challenges to the Commission's broadcast auction plan, the court issued

8. *See Bechtel v. F.C.C.*, 10 F.3d 875 (D.C. Cir. 1993) (*Bechtel II*).

9. *See FCC Freezes Comparative Proceedings*, 9 FCC Rcd 1055 (1994), *modified* 9 FCC Rcd 6689 (1994), *further modified*, 10 FCC Rcd 12182 (1995).

10. *See Second Further Notice of Proposed Rulemaking*, 9 FCC Rcd 2821 (1994).

11. Pub. L. No. 105-33, 111 Stat. 251 (1997).

12. *See Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, First Report and Order, 13 FCC RCD 15920, ¶¶ 27-30 (1997) ("First Report and Order").

13. *See In re Applications for Construction Permit for a New FM Station on Channel 250A in Selbyville, Delaware*, Order, 14 FCC Rcd 7633 (1999).

14. *See Bechtel v. FCC*, No. 98-1444 (D.C. Cir. filed Sept. 21, 1998) ("*Bechtel III*"); *Bechtel v. FCC*, No. 99-1212 (D.C. Cir. filed June 8, 1999) ("*Bechtel IV*").

a *per curiam* opinion summarily dismissing all of the petitioners' appeals, including those of direct relevance to Anchor.¹⁵

Despite the uncertainties resulting from years of administrative delay and legal wrangling, Anchor took the risk of building the station under the Selbyville Permit. Anchor's WSBL(FM) (now WWAY(FM)) began broadcasting to the public in 1993, and continues to operate to this day. During that time, Anchor waited for the Commission to issue new comparative criteria, and then, after Congress passed the Balanced Budget Act, waited two more years for the Commission to devise and implement its broadcast auction procedures. Finally, Anchor participated in the 1999 Closed Broadcast Auction, and placed what turned out to be the highest net bid for the Selbyville Permit – \$210,000.

Discussion

In the Petition and its subsequent Petition for Reconsideration, Anchor argued that because its circumstances are analogous to those of an applicant faced with a petition to deny, it should receive the same temporary relief from payment obligations. Anchor asked that the Commission grant this relief either by declaratory ruling pursuant to Section 1.2 of the Commission's rules, or by waiver pursuant to Section 1.3.¹⁶

Section 1.2109(a) of the Commission's rules states that "auction winners are required to pay the balance of their winning bids in a lump sum within ten (10) business days following the

15. See *supra* note 1.

16. Waiver requests must be "founded on an appropriate general standard, show[] special circumstances warranting a deviation from the general rule, and [] serve the public interest." *BellSouth v. FCC*, 162 F.3d 1215, 1225 n.10 (D.C. Cir. 1999), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1970).

release of a public notice establishing the payment deadline.”¹⁷ However, auction winners that are subject to petitions to deny need not submit the balance of their winning bids until such petitions filed against them are denied or dismissed.¹⁸ To justify this rule delaying payment under certain circumstances, the Commission concluded as follows:

[W]e believe that concerns regarding delayed payment are outweighed by the risk and uncertainty that would be imposed on an applicant if it were required to make its full auction payment while a petition against its application was still pending and could potentially result in denial of the application. As a result, we decline to amend our rules to require all winning bidders to make their full payments at the same time, regardless of whether petitions to deny their applications have been filed.¹⁹

In short, the Commission decided that it would not require an auction winner to pay for the permit it won until the “risk and uncertainty” over whether the winning bidder would ultimately receive the permit had been eliminated.

The Bureau rejected this argument on two grounds. First, it found that Anchor “does not face ‘the same risk and uncertainty’ as a party which is faced with a petition to deny.”²⁰ Second, the Bureau concluded that in order to grant Anchor’s request that it be treated in the same manner as all similarly situated applicants, it would have to “delay final payments in virtually all of the broadcast auctions until the Bechtel [Orion] litigation is terminated.”²¹ Neither argument stands up

17. 47 C.F.R. § 1.2109(a); *see also* 47 C.F.R. § 73.5003(c) (establishing a similar payment deadline rule for broadcast auctions).

18. *See Amendment of Part 1 of the Commission’s Rules – Competitive Bidding Procedures*, Third Report and Order and Further Notice of Proposed Rule Making, 13 FCC Rcd 374, at ¶¶ 97-99 (1997) (“*Competitive Bidding Procedures*”).

19. *Id.* at ¶ 99.

20. First Letter Ruling at 3.

21. *Id.*

to closer scrutiny, and thus neither provides a compelling reason for denying Anchor the equitable treatment it seeks.

Underlying the Bureau's first argument is the faulty notion that Anchor somehow faces a different "risk and uncertainty" than a winning bidder whose application is challenged by a petition to deny. According to the Bureau, the "risk and uncertainty" recognized by the Commission in *Competitive Bidding Procedures* "refers specifically to the risk inherent in a pending petition to deny an application, and the potential denial of that application."²² The Bureau's conclusion, however, is based on a distinction without a difference. The pending *Bechtel* litigation, as a practical matter, means that Anchor faces *precisely* the same "risk and uncertainty" as a winning bidder faced with a petition to deny – namely that it might not receive the permit for which it has bid.

That Anchor, unlike a party faced with a petition to deny, "does not risk having its individual application dismissed"²³ is inapposite. As an initial matter, a court *could* direct the FCC to dismiss all pending applications, including Anchor's. Further, the Bureau seems to suggest that, unlike a party faced with a petition to deny whose application would be dismissed outright, Anchor might have a chance to win the Selbyville Permit by some other means if it lost its case in court.²⁴ But any such nebulous future opportunity to win the permit would offer little solace to Anchor, because in the interim its \$210,000 would sit in the Commission's coffers collecting dust, not interest. Indeed, the Commission could hold Anchor's money for months or years before choosing the ultimate recipient of the Selbyville Permit.

22. *Id.*

23. *Id.*

24. Perhaps the Bureau contemplates Anchor filing yet another application, waiting several additional years, and then enduring some new selection procedure – Anchor's third.

The Bureau's second argument, that in order to grant Anchor's request, the Commission would have to "delay final payments in virtually all of the broadcast auctions until the Bechtel litigation is terminated[...]"²⁵ should fail because this Bureau has substantially overstated the precedential force of granting Anchor's requested relief. As Anchor explained in its Petition for Reconsideration, the petitioners in Bechtel/Orion fit within a very narrowly defined class:

Each petitioner participated in a fully-litigated comparative proceeding. Each petitioners' case had advanced through at least an initial decision by an administrative law judge, only to be "frozen" by the Commission in light of the D.C. Circuit's invalidation of the integration criterion in *Bechtel II*. By the Commission's own count, "fewer than ten" such cases survived to be decided by competitive bidding. [citations omitted] The *Orion* petitioners represent six of these fewer than ten cases.²⁶

Moreover, as previously noted, Anchor's case presents several additional characteristics that distinguish it from those of other Auction participants, and thus narrow the impact of any decision by the Commission to grant Anchor's request for relief. Unlike any other applicant, Anchor prevailed both in a comparative hearing and at auction. Also, Anchor has been operating the Selbyville station under a non-final authorization for several years, providing service to the public in spite of the attendant uncertainty surrounding its status as a licensee. For these reasons, the Commission should have little difficulty confining the relief requested by Anchor to only a handful of applicants should they request it as well, or to Anchor alone.²⁷

25. *Id.*

26. Petition for Reconsideration at 4.

27. The Bureau's additional argument that the Bechtel/Orion litigation could ultimately result in a court setting aside the Commission's broadcast auction rules generally, rather than limiting a decision in that litigation to the narrow issues advanced by the petitioners, is similarly strained. The *Orion Communications* petitioners did not request, and The D.C. Circuit did not even suggest, such a general rejection of the Commission's rules in its recent
(continued...)

In addition to the points discussed above, the Bureau has raised two additional issues in its Second Letter Ruling that, although not responsive to any argument made by Anchor in any of its filings, merit rebuttal. First, the Bureau states that “[w]ere we to accept Anchor’s position, the Commission would have to forego collecting payment . . . until court proceedings (over the timing of which the Commission has no control) *have reached a point that Anchor considers ‘final.’*” This statement seems to suggest that Anchor would have the Bureau delay Anchor’s final payment until some arbitrary, indefinite, and subjective future point in time. In fact, finality of a Commission action, such as the grant of a construction permit, is a familiar concept with which the Bureau should be well acquainted. Finality occurs at such time as the action cannot be reviewed by the Commission, either on its own motion or by a third-party petition, or by any court of competent jurisdiction. Anchor expects the same definition will apply here -- should the day ever come that Bechtel and her co-petitioners have exhausted their legal remedies, Anchor will be willing and able to submit the balance of its winning bid.

Perhaps more disturbing is the Bureau’s subsequent assertion that, by requesting this temporary delay in its payment deadline, Anchor is somehow subverting the public interest. Specifically, the Bureau stated as follows:

Given that the Commission is collecting [auction] payments on behalf of the public, which owns the spectrum auctioned to Anchor, and given that Anchor by its own admission has been using that spectrum for the past seven years, requiring Anchor to make its final payment in a timely manner is not unduly burdensome. Considering that virtually every other winning bidder will have to make full payment *before* it can

27. (...continued)
decision and “Judgment” in *Orion Communications*.

realize any revenue from its investment, it is only fair and reasonable that Anchor make timely payment after having used its frequency since 1993.²⁸

These sentiments betray an unsettling lack of understanding of Anchor's circumstances by the Bureau.

Through no fault of their own, Anchor's *fifteen-year* effort to secure the Selbyville Permit has been a grueling experience for those involved. Anchor engaged in and prevailed in an expensive and time-consuming comparative hearing, only to have its victory rendered meaningless because the Commission could not defend the criteria it used to allocate broadcast licenses. Anchor's efforts in that comparative hearing and subsequent appeal to the D.C. Circuit were rewarded with nothing but a second victory at the Commission and another loss in court. Then the Commission put the entire process on hold, where it remained, effectively, until last year's auction.

To recoup some of its already substantial investment, and to begin providing a valuable broadcasting service to the public, Anchor elected to build the station, only to find its business hampered by the unsettled nature of its permit. Anchor hopes that the Bureau, or for that matter Galaxy or Bechtel, never has to face the difficult tasks of attracting talented station staff, building a reliable advertising base, or securing programming, with a license that could be revoked at any time. Suffice to say, the pall cast over the operation of WSBL(FM) by the Commission's indecision made generating revenue difficult, recovering investment unlikely, and turning a profit nearly impossible.

Anchor hopes that the Commission will consider these factors when evaluating the Bureau's observation that Anchor has derived some substantial benefit from "us[ing] its frequency since 1993." Any benefit so enjoyed by Anchor has plainly been outweighed by the physical,

28. Second Letter Ruling at 2 (emphasis in original).

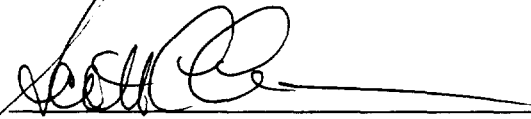
emotional and financial strains that this decade-and-a-half long process has placed on Anchor's general and limited partners. Any suggestion that the equities of this case are somehow not on Anchor's side implies, at best, an incomplete awareness of the facts involved.

Conclusion

Based on the foregoing, Anchor Broadcasting Limited Partnership requests that the Commission reverse the decision of the Chief of the Audio Services Division, Mass Media Bureau, and grant, either by declaratory ruling or waiver, Anchor's request for temporary relief from its obligation to pay the balance due on its high bid on the Selbyville Permit in the Auction. Anchor requests that such relief continue only until such time as the grant of the permit can no longer be reviewed by the Commission or by any court.

Respectfully submitted,

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June 22, 2000

CERTIFICATE OF SERVICE

I, James Morgan, of the law firm of Shook, Hardy & Bacon, do hereby certify that I have on this 22nd day of June, 2000 caused to be mailed by first class mail¹, postage prepaid, copies of the foregoing **"Petition for Review"** to the following:

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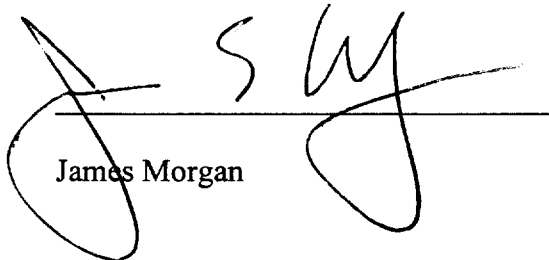
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